
PRIVATE ATTORNEYS GENERAL AND THE DEFENDANT CLASS ACTION

In 2021, Texas enacted a new antiabortion law.¹ The law, SB 8, garnered attention for its dramatic curtailment of abortion rights.² But, more esoterically, it drew attention for its unusual enforcement mechanism.³ SB 8 grants private citizens the authority to sue to enforce the law.⁴ Often, to prevent the enforcement of an unconstitutional law, a rightsholder sues the attorney general to enjoin her from enforcing it.⁵ SB 8's structure attempts to circumvent such antisuit injunctions. Even if one "private attorney general" can be enjoined, every other potential private attorney general remains able to sue. The law's unconstitutionality is still a *defense*.⁶ But, in litigation as in war, an offensive posture is often preferred: antisuit injunctions mitigate the chilling effects of looming enforcement, even if that enforcement is unlikely to succeed.⁷

Ultimately, the Supreme Court allowed a preenforcement suit to proceed, but only against certain government officials whom, it held, SB 8 did not preclude from suing.⁸ The Court's holding offers no avenue to challenge private enforcement of analogous laws, leaving an SB 8-shaped hole in the protection of all constitutional rights — from abortion to gun ownership and speech.⁹

This Note suggests a possible solution. There is a well-trodden path to binding parties en masse: the class action. The Note argues that a defendant class action is a viable mechanism for enjoining the enforcement of unconstitutional laws by private attorneys general.

After Part I sets forth some background, Part II examines the Article III implications of a defendant class action maintained against a class

¹ Texas Heartbeat Act, 2021 Tex. Gen. Laws ch. 62 (codified in TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–212 (West 2021)).

² E.g., Jon Michaels & David Noll, Opinion, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021), <https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html> [https://perma.cc/6E3K-WMUV].

³ See *id.*

⁴ TEX. HEALTH & SAFETY CODE ANN. §§ 171.207–171.208 (West 2021).

⁵ See Caitlin E. Borgmann, *Legislative Arrogance and Constitutional Accountability*, 79 S. CAL. L. REV. 753, 765 (2006).

⁶ *Id.*

⁷ Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention into Ongoing State Court Proceedings*, 66 N.C. L. REV. 49, 58 (1987); see Dombrowski v. Pfister, 380 U.S. 479, 487–89 (1965); Borgmann, *supra* note 5, at 765.

⁸ Whole Woman's Health v. Jackson, No. 21-463, slip op. at 10–11 (U.S. Dec. 10, 2021); *id.* at 12–14 (opinion of Gorsuch, J.).

⁹ E.g., Eugene Volokh, *Challenging Unconstitutional Civil Liability Schemes, as to Abortion, Speech, Guns, Etc.*, VOLOKH CONSPIRACY (Sept. 3, 2021, 2:31 PM), <https://reason.com/volokh/2021/09/03/challenging-unconstitutional-civil-liability-schemes-as-to-abortion-speech-guns-etc> [https://perma.cc/E6DE-W9LN].

of private attorneys general. Part III considers the viability of such a class under Federal Rule of Civil Procedure 23. Finally, Part IV addresses potential due process objections to this Note's proposal.

I. BACKGROUND

A. *The Defendant Class Action*

Though defendant class actions are today less common than their plaintiff counterparts,¹⁰ the modern class action has its roots in collective actions against groups of defendants.¹¹ As early as the seventeenth century, courts permitted plaintiffs to join large numbers of defendants,¹² and Federal Rule of Civil Procedure 23, the class action rule we know and love today, grew out of that common law tradition.¹³

Scholars have highlighted the potential of the defendant class action, including to enforce civil rights and to sue private parties.¹⁴ They have also observed the concentration of defendant classes in the context of constitutional challenges: over a third of all defendant classes comprise government officials certified to enjoin them from enforcing unconstitutional laws.¹⁵ None of this literature, however, has contemplated a suit against a defendant class of private attorneys general.

B. *Costs of Private Attorneys General*

Constitutional challenges are often brought via injunctions.¹⁶ The plaintiff alleges that she has engaged in or wishes to engage in constitutionally protected but statutorily barred activity. She sues the statute's enforcer — typically the attorney general — to obtain an injunction prohibiting the official from enforcing the law.¹⁷ That injunction, if

¹⁰ 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 5:1 (5th ed.), Westlaw (database updated June 2021).

¹¹ *Id.* § 5:2.

¹² *Id.*

¹³ *Id.*

¹⁴ E.g., A. Peter Parsons & Kenneth W. Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 ECOLOGY L.Q. 881, 883 (1975); Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 82–83 (2010); Angelo N. Ancheta, Comment, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 292–93 (1985).

¹⁵ Shen, *supra* note 14, at 83.

¹⁶ See Borgmann, *supra* note 5, at 765.

¹⁷ *Id.* *Ex parte Young*, 209 U.S. 123, 148 (1908), and 42 U.S.C. § 1983 authorize suits against state action that violates federal rights, including for injunctive relief. See *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *infra* note 155. This Note argues that state action exists when a private attorney general brings suit. See Howard M. Wasserman, *Solving the Procedural Puzzles of Texas' Fetal-Heartbeat Law* 16–18 (FIU Legal Stud. Rsch. Paper Series, Research Paper No. 21-15, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906693 [https://perma.cc/3E8Z-WXWC]; *infra* section II.A.2, pp. 1425–26.

issued, binds only the attorney general, her inferiors, and her successors.¹⁸ Anyone not under the aegis of the official sued need not abide by the prohibition.¹⁹ Moreover, if an injunction issues against a rank-and-file civil servant, not even her fellow civil servants are bound by it.²⁰ Thus, if a private attorney general were sued and enjoined from enforcing the law, no one else would be bound by that judgment.

The rightsholder can still raise the law's unconstitutionality as a defense. But a defensive posture is less appealing than an offensive one. Defending against a suit imposes costs: money, time, and the risk that the rightsholder will actually be found not to have the right she purported to exercise and held liable under the law²¹ — a cost that is amplified where the constitutionality of all or part of a law is uncertain.²² Those potential costs have chilling effects.²³ Chilling, often cited as the core rationale for the insufficiency of a defensive posture against a uniform enforcer,²⁴ remains the key concern with dispersed enforcers.²⁵

By contrast, an injunction stops a suit in its tracks. An antisuit injunction can be enforced through contempt proceedings,²⁶ with penalties taking the form of fines or even imprisonment.²⁷ Both disincentivize bringing meritless suits; the former further mitigates chilling effects by reimbursing her for her costs in asserting her rights.²⁸

C. SB 8 at the Supreme Court

Two suits challenging SB 8 wove their way to the Supreme Court. The first, brought by the federal government against the State of Texas, was dismissed as improvidently granted, provisionally leaving the law

¹⁸ Cf. Howard M. Wasserman, *Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace*, 110 NW. U. L. REV. ONLINE 1, 4–5 (2015) (discussing the injunctive scope of efforts to bar enforcement of state same-sex marriage bans).

¹⁹ See *id.*; 2 RUBENSTEIN, *supra* note 10, § 5:1.

²⁰ Cf. Wasserman, *supra* note 18, at 4; FED. R. CIV. P. 65(d)(2).

²¹ See Ilya Somin, *Limiting Principles and the Texas SB 8 Case — Why Texas' Law Is a Greater Slippery Slope Menace than a Ruling Against It Would Be*, VOLOKH CONSPIRACY (Nov. 2, 2021, 5:09 PM), <https://reason.com/volokh/2021/11/02/limiting-principles-and-the-texas-sb-8-case-why-texas-law-is-a-greater-slippery-slope-menace-than-a-ruling-against-it-would-be> [https://perma.cc/5H8E-DNCT].

²² See Abbott Lab'y's v. Gardner, 387 U.S. 136, 153 (1967), abrogated by Califano v. Sanders, 430 U.S. 99 (1977).

²³ See Borgmann, *supra* note 5, at 765; Collins, *supra* note 7, at 58.

²⁴ See Dombrowski v. Pfister, 380 U.S. 479, 487–89 (1965); Borgmann, *supra* note 5, at 765; Collins, *supra* note 7, at 58.

²⁵ See Volokh, *supra* note 9.

²⁶ E.g., Brown v. Kelly, 609 F.3d 467, 472 & n.3, 480–81, 481 n.15 (2d Cir. 2010).

²⁷ See 18 U.S.C. § 401; 11A ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 2960 (3d ed.), Westlaw (database updated Apr. 2021).

²⁸ See 11A MILLER ET AL., *supra* note 27, § 2960; John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1583 (1993).

in effect.²⁹ The second, brought by a group of abortion providers, named as defendants a private individual, a state court judge and clerk (each as the representative of a putative class of defendants), the directors of four Texas executive agencies, and the Texas Attorney General.³⁰ Construing SB 8 not to eliminate the agency directors' duty under a distinct statute to enforce Texas's Health and Safety Code (in which SB 8 sits), the Court held that those defendants — but only those defendants — were proper.³¹

The Supreme Court's decision thus offers no avenue to challenge private enforcement of SB 8 analogs, several of which have already been enacted.³² While the Court did not foreclose a suit by the Department of Justice, that avenue hinges in large part on the political alignment of the United States' Executive with the right chilled. A Democratic administration brought suit to defend the right to abortion. It would not intervene to challenge a law that created a private right of action "against anyone who manufactures, distributes, or sells an assault weapon or ghost gun kit or parts."³³

The implications of such copycat laws for rightsholders are serious.³⁴ The tried avenues to challenging them appear inadequate. This Note proposes a new alternative: a defendant class action.

II. THE ARTICLE III PROBLEM

Under Article III of the United States Constitution, the judicial power of federal courts extends to "cases" and "controversies."³⁵ A case or controversy requires a proper defendant.³⁶ This prerequisite grows

²⁹ *United States v. Texas*, No. 21-588, slip op. at 1 (U.S. Dec. 10, 2021) (per curiam).

³⁰ *Whole Woman's Health v. Jackson*, No. 21-463, slip op. at 2–3 (U.S. Dec. 10, 2021).

³¹ *Id.* at 10–11; *id.* at 12–14 (opinion of Gorsuch, J.). By contrast, the Court found that the Texas attorney general had no such duty, and so was not a proper defendant. *Id.* at 10–11 (majority opinion). The Fifth Circuit later certified to the Supreme Court of Texas the question whether this construction was correct. *Whole Woman's Health v. Jackson*, No. 21-50792, 2022 WL 142193, at *6 (5th Cir. Jan. 17, 2022). Under longstanding precedent, judges (and, by the same token, clerks) are insufficiently adverse to be proper parties. *Whole Woman's Health*, slip op. at 5–8. The private individual was not a proper defendant because he had not brought, and averred that he had no intention of bringing, suit under SB 8. *Id.* at 14.

³² See, e.g., Kathryn Hayes Tucker, "*The SB 8 Domino Effect*: Copycat Laws Mimic Texas Abortion Ban that Is Currently Before SCOTUS," LAW.COM (Nov. 3, 2021, 2:17 PM) <https://www.law.com/2021/11/03/the-sb8-domino-effect-copycat-laws-mimic-texas-abortion-ban-currently-before-scotus> [https://perma.cc/4KT7-M2CX]; Borgmann, *supra* note 5, at 759.

³³ Press Release, Gavin Newsom, Governor of California, Governor Newsom Statement on Supreme Court Decision (Dec. 11, 2021), <https://www.gov.ca.gov/2021/12/11/governor-newsom-statement-on-supreme-court-decision> [https://perma.cc/QA7J-HK5R].

³⁴ E.g., Steve Vladeck, *Texas Abortion Law Reveals the Limits of Our Constitutional Rights*, MSNBC (Sept. 9, 2021, 5:31 AM), <https://www.msnbc.com/opinion/texas-abortion-law-reveals-limits-our-constitutional-rights-n1278728> [https://perma.cc/8Z8N-T5EZ].

³⁵ U.S. CONST. art. III, § 2, cl. 1.

³⁶ *Common Cause v. Biden*, 748 F.3d 1280, 1284 (D.C. Cir. 2014).

out of standing, an element of justiciability, which includes redressability and imminence requirements: for a case to be justiciable, the plaintiff must be threatened by a relatively proximate injury that is in some way capable of being repaired by the remedy sought.³⁷ If a plaintiff sues a defendant who does not imminently threaten her, she cannot obtain redress from that defendant, and therefore lacks standing.³⁸

A defendant class like that proposed in this Note poses two unusual case-or-controversy problems, both grounded in the proper-defendant requirement. First, an imminence problem: not all of the people who have the right to enforce the law are likely ever to do so. Second, a bilateralism problem: of those who do wish to enforce the law, not all are likely to enforce it against any given rightsholder. To illustrate: Assume a plaintiff seeks an antisuit injunction against an enforcer. No other potential enforcer poses the same *imminent* threat of enforcement *to her*.³⁹ Obtaining an injunction against them would not redress her injury. They thus seem not to be proper defendants under Article III.

Defendant class action law has developed a solution: the juridical link.⁴⁰ The juridical link doctrine is triggered when class members are somehow sufficiently related.⁴¹ The doctrine then permits a class action to be maintained against each defendant individually.⁴² Although it is sometimes characterized as a procedural rather than a justiciability inquiry,⁴³ this Note argues that the doctrine surmounts Article III problems in maintaining a defendant class action, in general and as applied to a class of private attorneys general. The quintessential juridical link is often said to be the link between members of “a defendant class of government officials acting in accordance with an allegedly unconstitutional law.”⁴⁴ Likewise, a juridical link exists among a class of private attorneys general — and it overcomes the Article III problem.

A. Does a Juridical Link Exist?

I. Three Factors. — In determining whether a juridical link exists among a putative class of defendants, courts have relied on several factors: (1) a may/must axis; (2) the similarity of the challenged action; and (3) whether the defendants have an independent legal relationship.⁴⁵

³⁷ *Id.*

³⁸ See *id.* at 1284–85.

³⁹ See 2 RUBENSTEIN, *supra* note 10, § 5:17.

⁴⁰ See *id.*

⁴¹ See *id.*; *In re Eaton Vance Corp. Sec. Litig.*, 220 F.R.D. 162, 165 (D. Mass. 2004).

⁴² 2 RUBENSTEIN, *supra* note 10, § 5:17.

⁴³ 1 *id.* § 3:49; 2 *id.* § 5:17; William D. Henderson, Comment, *Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III*, 67 U. CHI. L. REV. 1347, 1361–63 (2000).

⁴⁴ 2 RUBENSTEIN, *supra* note 10, § 5:17.

⁴⁵ See *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70, 77 (S.D.N.Y. 1986).

The first factor, the may/must axis, reflects courts' greater willingness to find juridical links where the defendants have some duty to behave in the manner challenged⁴⁶ than in cases involving discretion.⁴⁷ Private attorney general laws are unlikely to *compel* anyone to sue. They thus appear to fail this test.

But the may/must distinction seems to serve only to ensure uniformity — in other words, as a proxy for the second factor. Courts have so implied,⁴⁸ and the juridical link has not been defeated by the presence of prosecutorial or other discretion.⁴⁹ Uniformity is beyond cavil in the context of SB 8 suits: each would-be enforcer stands in precisely the same way relative to the rightsholder's conduct.

The third factor recognizes that courts are more likely to find a juridical link where the defendants share an "independent legal relationship."⁵⁰ Acting pursuant to state-conferred power unifies a group of defendants by the source of authority into which they tap, and thereby creates such a relationship.⁵¹ And while identical private, independent violations of law do not create a juridical link,⁵² a few courts have in fact certified classes of private individuals acting pursuant to state-conferred authority. For instance, *Lynch v. Household Finance Corp.*⁵³ involved a suit under 42 U.S.C. § 1983, which requires action "under color of law."⁵⁴ There, the court certified a class of private

⁴⁶ E.g., *Payton v. County of Kane*, 308 F.3d 673, 679 (7th Cir. 2002) (citing *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 838 (11th Cir. 1990)).

⁴⁷ E.g., *Mudd v. Busse*, 68 F.R.D. 522, 528 (N.D. Ind. 1975), *on reconsideration*, 437 F. Supp. 505 (1977), *aff'd*, 582 F.2d 1283 (7th Cir. 1978).

⁴⁸ E.g., *Payton*, 308 F.3d at 681–82; *Angel Music*, 112 F.R.D. at 77.

⁴⁹ E.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 954–55 (W.D. Tex. 2011), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012); *Mental Disability L. Clinic v. Hogan*, No. CV-06-6320, 2008 WL 4104460, at *22 (E.D.N.Y. Aug. 29, 2008).

⁵⁰ *Barker v. FSC Sec. Corp.*, 133 F.R.D. 548, 553 (W.D. Ark. 1989) (quoting *Akerman v. Oryx Commc'nns, Inc.*, 609 F. Supp. 363, 375 (S.D.N.Y. 1984), *aff'd*, 810 F.2d 336 (2d Cir. 1987)); cf. *In re Tri-State Crematory Litig.*, 215 F.R.D. 660, 686 (N.D. Ga. 2003) (quoting *Canady v. Allstate Ins. Co.*, No. 94CV0174, 1997 WL 33384270, at *6 (W.D. Mo. June 19, 1997), *aff'd*, No. 97-3075, 1998 WL 403200 (8th Cir. 1998) (per curiam)).

⁵¹ See, e.g., *Payton*, 308 F.3d at 680 (noting that because the defendant government officials were "an arm of the state," the plaintiffs could reasonably "try to hold all counties accountable within one suit"); *Angel Music*, 112 F.R.D. at 77 (connecting the presence of an "enforced system" to the independent legal relationship requirement); *United States v. Trucking Emps., Inc.*, 75 F.R.D. 682, 686 (D.D.C. 1977) (noting that the challenge was "directed at everyone who derives authority from the statute," each of whom "share[s] an interest in the vitality of the statute").

⁵² *Angel Music*, 112 F.R.D. at 75–77.

⁵³ 360 F. Supp. 720 (D. Conn. 1973).

⁵⁴ This Note does not distinguish between state action and action under color of law. While the Supreme Court has at times suggested that action under color of law might sweep more broadly than state action, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982), more recent cases largely collapse this distinction, e.g., *Filarsky v. Delia*, 566 U.S. 377, 383 (2012).

creditors who had garnished debtors' accounts pursuant to a state statute.⁵⁵

2. *State Action.* — It thus becomes relevant whether private attorney general suits are state action. What effects the transubstantiation from private to state actor is not always clear, but one indicator is the “traditional public function” test.⁵⁶ It looks to whether the actor exercises functions delegated by the state that are historically, traditionally, and exclusively “governmental in nature. . . . [I]f the government must satisfy certain constitutional obligations when carrying out its functions,” the theory runs, “it cannot avoid those obligations . . . by delegating governmental functions to the private sector.”⁵⁷

Private attorneys general readily meet this test. They enforce statutory prohibitions that the state deems in the public interest — in other words, public rights.⁵⁸ That enforcement fits comfortably within the confines of both traditional and exclusive government functions.⁵⁹ Private attorneys general derive their authority to enforce exclusively from the state: they exercise state-delegated power.⁶⁰ And these mechanisms (certainly, SB 8) are specifically designed to avoid the constraints on government enforcement.⁶¹ That is precisely the kind of circumvention that the traditional public function test targets.⁶² And indeed, some have applied this test to conclude that SB 8 enforcers are state actors.⁶³

⁵⁵ *Lynch*, 360 F. Supp. at 722; see also *Gibbs v. Titelman*, 369 F. Supp. 38, 50–53 (E.D. Pa. 1973), *rev'd on other grounds*, 502 F.2d 1107, 1114 (3d Cir. 1974) (finding no state action without disputing the district court's holding as to certifiability).

⁵⁶ See MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §§ 5.10, 5.11, 5.14 (4th ed. Supp. 2022).

⁵⁷ *Id.* § 5.14.

⁵⁸ Cf. Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 355, 384 (1989) (discussing enforcement in the qui tam context).

⁵⁹ Wasserman, *supra* note 17, at 17–18. The Executive's monopoly on enforcement is so entrenched that, at the federal level, it has been constitutionalized in the form of Article II restrictions on standing. See, e.g., Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1834, 1845–46 (2016).

⁶⁰ See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) (The “government has ‘create[d] the legal framework governing the [challenged] conduct,’ and in a significant way has involved itself with invidious [right-infringement].” (alterations in original) (citation omitted) (quoting Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988)); cf. Isaac B. Rosenberg, *Raising the Hue . . . And Crying: Do False Claims Act Qui Tam Relators Act Under Color of Federal Law?*, 37 PUB. CONT. L.J. 271, 294 (2008) (stressing the False Claims Act's “assignment of government authority” in finding qui tam relators to be state actors).

⁶¹ See Jacob Sullum, *Can a Federal Judge Stop State Courts from Hearing the Lawsuits Authorized by the Texas Abortion Ban?*, REASON (Oct. 7, 2021, 4:10 PM), <https://reason.com/2021/10/07/can-a-federal-judge-stop-state-courts-from-hearing-the-lawsuits-authorized-by-the-texas-abortion-ban> [<https://perma.cc/NP9K-V37F>].

⁶² SCHWARTZ, *supra* note 56, § 5.14.

⁶³ E.g., Wasserman, *supra* note 17, at 16–18.

It is also notable that a private party's ability to trigger judicial action seems to be crucial to the state action analysis. *Shelley v. Kraemer*⁶⁴ can be so characterized, for instance.⁶⁵ So too can *Lugar v. Edmondson Oil Co.*,⁶⁶ in which the Supreme Court held that a creditor's prejudgment attachment of a debtor's property was state action,⁶⁷ and *Edmonson v. Leesville Concrete Co.*,⁶⁸ in which the Court found peremptory challenges to constitute state action.⁶⁹ Private attorney general enforcement sits readily within this vein. The alignment of the express traditional public function test with the judicial-action correlation counsels strongly in favor of finding state action.⁷⁰

3. *Possible Objections.* — One could argue that typical state actors differ from private attorneys general in that “state actor” encompasses a clear set of people, all of whom are already state actors at the time of class formation, whereas private attorneys general do not become state actors until they take the vesting act of suing a violator. But an injunction against a class of government officials almost certainly binds future officials;⁷¹ yet becoming a government official likewise requires a vesting act — that of employment. While binding a future party may cause discomfort, it is a discomfort class action law has learned to accept.⁷² If a future act of *employment* may thus trigger an *ex post* juridical link, and thereby a binding injunction, so too should a future act of *bringing suit* in a private attorney general capacity.

⁶⁴ 334 U.S. 1 (1948).

⁶⁵ *Id.* at 20 (“[I]n granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws . . .”).

⁶⁶ 457 U.S. 922 (1982).

⁶⁷ *Id.* at 924, 942.

⁶⁸ 500 U.S. 614 (1991).

⁶⁹ *Id.* at 622; *cf., e.g.*, *Manhattan Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928–29 (2019) (finding no state action in the absence of such empowerment). *But cf.* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291–94 (2001).

⁷⁰ A compelling analogy exists between private attorney general suits and *qui tam* actions, in which a private person (a “relator”) “maintains a civil proceeding on behalf of both herself and the United States to recover damages and/or to enforce penalties available under a statute prohibiting specified conduct.” Caminker, *supra* note 58, at 341 & n.1. Relators are sometimes bound by the acts of their fellow, but unrelated, relators. *E.g.*, CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 10:113, Westlaw (database updated Apr. 2021) (citing *Ariz. Med. Billing Inc. v. FSIX LLC*, No. CV-17-04742, 2019 WL 467079, at *2 (D. Ariz. Feb. 6, 2019)). The question in the juridical link context is precisely this: whether private attorneys general are bound by judgments against fellow, unrelated enforcers.

⁷¹ See *Monaco v. Stone*, 187 F.R.D. 50, 64 (E.D.N.Y. 1999). *Marcera v. Chinlund*, 595 F.2d 1231 (2d Cir. 1979), *vacated sub nom.* *Lombard v. Marcera*, 442 U.S. 915 (1979), noted that Article III mandated a defendant class that corresponded geographically to the plaintiff class. *Id.* at 1237–38. Insofar as many defendant class actions explicitly (or implicitly) contemplate future plaintiff class members, *e.g.*, *Doss v. Long*, 93 F.R.D. 112, 114, 120 (N.D. Ga. 1981), temporal correspondence of defendant class members also seems to follow, even if it is not expressly stated.

⁷² See *infra* section III.A.1, pp. 1429–30.

B. Does the Juridical Link Doctrine Solve the Justiciability Issue?

Authorities disagree whether the juridical link doctrine answers a procedural or standing question. The Supreme Court has said that class actions “add[] nothing to the question of standing.”⁷³ Many courts, relying on this language, have reasoned that a class action can add nothing to the question of who is a proper defendant, such that the juridical link doctrine must speak to typicality,⁷⁴ the procedural requirement that the class representative’s defenses be typical of class members’.⁷⁵ Certainly, typicality is part of the juridical link’s role: the doctrine allows a named plaintiff to sue a defendant who has not injured the named plaintiff, but has injured (or may injure) another class member. The named plaintiff is thus “atypical,” but not so atypical as to prevent certification.

Yet understanding the juridical link doctrine solely as a typicality doctrine fails to explain courts’ insistence on some relationship among the defendants. If identical acts are insufficient to create a juridical link,⁷⁶ the doctrine must be serving some function beyond typicality, whose alpha and omega are identity. Such an understanding also struggles to explain how a named plaintiff can sue a class of potential enforcers, none of whom are imminently likely to enforce the statute against any given plaintiff-class member, or indeed at all;⁷⁷ yet courts almost unfailingly find standing in these cases.⁷⁸ The juridical link doctrine is doing more than patching over a hole in typicality. Rather, it confers standing in the absence of imminence or bilateralism between any given plaintiff-class and defendant-class member.

Perhaps surprisingly, this is consistent with standing case law. The standing analysis in preenforcement challenges usually looks to the *plaintiff*’s (threatened) acts⁷⁹: it asks whether the plaintiff’s acts render attempted enforcement of a law against her imminent, without asking whether the person charged with enforcement would actually enforce

⁷³ Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 40 n.20 (1976).

⁷⁴ E.g., Javier H. v. Garcia-Botello, No. 02-CV-523S, 2011 WL 4344045, at *5 (W.D.N.Y. Sept. 14, 2011); Newport v. Dell, Inc., No. CV-08-00096, 2008 WL 4347017, at *3 (D. Ariz. Aug. 21, 2008), *adopted in part*, No. CIV 08-096, 2008 WL 4628723 (D. Ariz. Oct. 17, 2008); *In re Organogenesis Sec. Litig.*, 241 F.R.D. 397, 403–04 (D. Mass. 2007); *In re Eaton Vance Corp. Sec. Litig.*, 220 F.R.D. 162, 170 (D. Mass. 2004).

⁷⁵ FED. R. CIV. P. 23(a)(3).

⁷⁶ See *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70, 76 (S.D.N.Y. 1986).

⁷⁷ See, e.g., *Monaco v. Stone*, 187 F.R.D. 50, 53 (E.D.N.Y. 1999).

⁷⁸ *Blackburn v. Dare County*, 486 F. Supp. 3d 988 (E.D.N.C. 2020), is a rare exception. *See id.* at 995.

⁷⁹ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562–67 (1992); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 89–90 (1947). But cf. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) (finding the actions of potential enforcers informative as to ripeness); *S. Pac. Transp. Co. v. Redden*, 458 F. Supp. 593, 598–600 (D. Or. 1978) (looking to intent to enforce for criminal statutes, but noting that “[t]he mere existence of a civil statute is . . . more likely to present a real and immediate threat,” *id.* at 600), *aff’d sub nom. S. Pac. Transp. Co. v. Brown*, 651 F.2d 613 (9th Cir. 1980).

the law against her.⁸⁰ One could argue that this focus derives from the posture of typical antisuit injunction cases. Usually, the defendant or defendants are senior officers. The proper defendant question thus does not arise: if anyone enforces the law, enforcement is attributable to those defendants. But given the opportunity to consider the enforcer's viewpoint, courts have declined the invitation. In some antisuit injunction cases, the attorney general has proffered a policy of nonenforcement in an attempt to defeat standing.⁸¹ That strategy has failed.⁸²

It is also consistent with Article III generally. First, justiciability seeks in part to ensure concrete disputes.⁸³ A defendant class action looking to enjoin the enforcement of unconstitutional laws does not lack for concrete adversity or clear issues to be decided. Second, the third-party-standing doctrine permits the assertion of others' rights.⁸⁴ It is little extension to allow a named plaintiff to represent a fellow class member in asserting an identical claim against intimately linked parties. Finally, a plaintiff who sues a government official for an injunction against enforcement of a law does not obtain that relief solely on her own behalf.⁸⁵ Even though courts can issue injunctions limited to enforcement against that plaintiff, injunctions often prevent the enforcer from enforcing the statute against all people like the plaintiff — or against anyone, depending on the scope of the remedy.⁸⁶

III. CERTIFICATION UNDER RULE 23

A core problem of an SB 8–like law is the impossibility of obtaining injunctions against all potential enforcers individually. But there is a well-trodden path to binding parties not before the court en masse: the class action. Under Federal Rule of Civil Procedure 23, “[o]ne or more

⁸⁰ In antisuit injunction cases involving defendant classes of government officials, courts have refused to find suits premature on the ground that enforcement has not been threatened, finding the possibility of enforcement sufficient. *E.g.*, Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 951, 955 (W.D. Tex. 2011), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012); Union Pac. R.R. Co. v. Woodahl, 308 F. Supp. 1002, 1012–14 (D. Mont. 1970).

⁸¹ See, e.g., Gbalazeh v. City of Dallas, 394 F. Supp. 3d 666, 672 (N.D. Tex. 2019); see Stenberg v. Carhart, 530 U.S. 914, 940–41 (2000) (deciding the constitutionality of a state statute despite the state Attorney General's nonbinding narrowing interpretation).

⁸² *Gbalazeh*, 394 F. Supp. 3d at 672; *Stenberg*, 530 U.S. at 940–41, 945–46. Somewhat analogously, the voluntary cessation doctrine in mootness jurisprudence permits adjudication where the enforcer has paused enforcement, placing the onus on the *enforcer* to show that she will *not* resume enforcement. *11A MILLER ET AL.*, *supra* note 27, § 3533.7 (citing, *inter alia*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 187–93 (2000)).

⁸³ See *Craig v. Boren*, 429 U.S. 190, 194 (1976).

⁸⁴ *Id.*

⁸⁵ See Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924–27, 931 (2020).

⁸⁶ See *id.*

members of a class may sue or be sued . . . on behalf of all members.”⁸⁷ Given the right conditions, that the outcome of that suit will bind all class members, even if they did not have their day in court.⁸⁸ While the class is typically thought of as a plaintiff-side device, the Rule is not so limited. It expressly contemplates a class of defendants, providing that members of a class may “sue *or be sued*” as class representatives.⁸⁹ And when litigants take the Rule at its word, it is most often to enjoin the enforcement of an unconstitutional law.⁹⁰

Like plaintiff classes, defendant classes must meet the requirements of Rule 23.⁹¹ This Part examines those prerequisites as applied to a defendant class of private attorneys general.

A. Defining the Class

To be certified, a class must first be defined.⁹² Defining the class raises two problems. The first is that the class must be defined so as to permit the application of the juridical link doctrine. The second pertains to the scope of the class. This Note proposes to define the class as “the class of people who have or one day do bring suit”—with an asterisk.

i. The Main Clause. — The main clause has in mind the juridical link doctrine. As noted above, applying the doctrine to private attorneys general probably requires class members to have affirmatively chosen to wield their state-conferred power. As such, any definition that encompasses people with only the *capacity* to bring suit would likely fail for want of a juridical link. The proposed definition therefore defines the class by reference to an act, not an ability.

Despite raising definiteness and typicality concerns, classes encompassing future members are permissible.⁹³ Courts have read into Rule 23 a definiteness requirement,⁹⁴ but it is generally met if the class is determined by reference to objective criteria.⁹⁵ Those criteria may include future acts that make the future actors part of the class, such as an act of employment.⁹⁶ One court certified a class of “all those who

⁸⁷ FED. R. CIV. P. 23(a).

⁸⁸ 1 RUBENSTEIN, *supra* note 10, § 1:1.

⁸⁹ FED. R. CIV. P. 23(a) (emphasis added); see 2 RUBENSTEIN, *supra* note 10, § 5:1.

⁹⁰ 2 RUBENSTEIN, *supra* note 10, § 5:1; Shen, *supra* note 14, at 82.

⁹¹ 3 RUBENSTEIN, *supra* note 10, § 7:25; 1 *id.* § 3:1; 2 *id.* § 5:1.

⁹² FED. R. CIV. P. 23(c)(1)(B).

⁹³ See 1 RUBENSTEIN, *supra* note 10, § 3:15; 7 *id.* § 23:23.

⁹⁴ The lack of a textual foundation for the definiteness requirement is further reason that it should not bar the inclusion of future members. 1 *id.* § 3:2. Moreover, the injunction would be prohibitive, not mandatory, which mitigates definiteness concerns. *See* Brown v. Kelly, 609 F.3d 467, 481 n.15 (2d Cir. 2010).

⁹⁵ 1 RUBENSTEIN, *supra* note 10, §§ 3:2–3:3.

⁹⁶ 7 *id.* § 23:23 (citing Leonard v. Southtec, LLC, No. 04-0072, 2005 WL 2177013, at *9 (M.D. Tenn. Sept. 8, 2005)); *see also* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F.

are now, or will in the future be, civil defendants in Georgia courts.⁹⁷ Courts do sometimes refuse to certify classes of future members on the grounds that present members' concerns may differ from future members'.⁹⁸ But where the core claim is a statute's unconstitutionality, there is little reason that present and future members should diverge.

2. *The Asterisk.* — The "asterisk" targets the second problem: the class's scope. The existence and content of the asterisk depend on two questions: First, is the statute severable? And second, can a class be certified if it includes many people against whom relief might not issue?

Severability is the ability of some parts of the statute to remain in force while others are struck down.⁹⁹ If a statute is inseverable, all its applications stand or fall as one; if it can be severed, a court should prohibit enforcement only of the unconstitutional parts.¹⁰⁰ On its face, then, severability pertains to what *relief* can be granted. But if certification depends on the potential for relief, then relief questions like severability become certification questions.¹⁰¹

If the statute is inseverable, no asterisk to the class definition is needed: the class comprises all those who have brought or one day do bring suit. Likewise, no asterisk is needed if courts do not address severability at certification (though they will eventually have to decide it at the remedy stage). If, however, courts do decide severability at certification, *and* the statute is severed, the class definition must be cabined to correspond to the line of severance. The asterisk would then be a restrictive clause limiting the defendant class only to private attorneys general who sue rightsholders *of a certain type*. Importantly, though, any of these paths leads to a viable class definition.

(a) *Severability.* — When a court finds a statute unconstitutional, the relief can vary in scope. At one end of the spectrum, a court can enjoin the single, solitary application before it.¹⁰² At the other end, a court can enjoin the application of any part of the statute under any circumstance (so-called "facial" invalidation).¹⁰³ In between these two

Supp. 2d 942, 950, 952 (W.D. Tex. 2011) (certifying a class of future abortion providers), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012); Nat'l Org. for Women, Inc. v. Scheidler, 172 F.R.D. 351, 359 (N.D. Ill. 1997) (certifying a class of women "whose rights to the services of women's health centers . . . have been or will be interfered with by defendants' unlawful activities").

⁹⁷ Doss v. Long, 93 F.R.D. 112, 114 (N.D. Ga. 1981).

⁹⁸ 7 RUBENSTEIN, *supra* note 10, § 23:23.

⁹⁹ See Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 TEX. L. REV. 215, 219 (2020); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 740 (2010).

¹⁰⁰ Fallon, *supra* note 99, at 210.

¹⁰¹ Supreme Court precedent counsels against addressing the merits at the certification stage, except where necessary to deciding certification. 3 RUBENSTEIN, *supra* note 10, § 7:23.

¹⁰² RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 174 (7th ed. 2015); Walsh, *supra* note 99, at 758–59.

¹⁰³ FALLON ET AL., *supra* note 102, at 174.

extremes, a court can enjoin a subset of applications.¹⁰⁴ To do so, it can slice and dice the statute along many different axes. The language of the statute is one such axis.¹⁰⁵ Professor Richard Fallon has observed that the presence of easy fault lines in the text of a statute often determines whether the Court finds severance appropriate.¹⁰⁶ However, other axes are also possible. A court can, for instance, enjoin only a category of applications, even if that category is orthogonal to any particular language of the statute.¹⁰⁷ The choice of whether and how to enjoin only *some* applications of a statute is the law of severability.

SB 8 expressly encourages severance. It instructs that “every provision, section, subsection, sentence, clause, phrase, or word . . . and every application” of the statute “are severable from each other,” such that if “any application . . . to any person, group of persons, or circumstances is found by a court to be invalid or unconstitutional, the remaining applications of that provision to all other persons and circumstances shall be severed.”¹⁰⁸ Likewise, “[i]f any court declares or finds a provision of this chapter facially unconstitutional, when discrete applications of that provision can be enforced against a person, group of persons, or circumstances without violating the United States Constitution . . . those applications shall be severed from all remaining applications.”¹⁰⁹ The statute declares that courts may not ignore the severability requirements “on the ground that severance would rewrite the statute or involve the court in legislative or lawmaking activity.”¹¹⁰

Except for the last clause, the severability provision is identical to that in *Whole Woman’s Health v. Hellerstedt*,¹¹¹ an abortion case in which the Supreme Court declined to sever the statute and facially invalidated the law at issue.¹¹² It’s unlikely that the addition actually changes the severability analysis: if blue-pencilling a statute is indeed a legislative act, a federal court is unlikely to take at face value a state statute’s command to undertake it.¹¹³

¹⁰⁴ *Id.*

¹⁰⁵ Fallon, *supra* note 99, at 233; *see, e.g.*, Whole Woman’s Health v. Hellerstedt, 136 S. Ct. 2292, 2352 (2016) (Alito, J., dissenting).

¹⁰⁶ Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 956–59 (2011).

¹⁰⁷ Fallon, *supra* note 99, at 233; *see also* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1331, 1334 (2000) (conceiving of these categories as “subrules” embedded within statutory provisions, *id.* at 1331); Walsh, *supra* note 99, at 739, 758–59 (citing *United States v. Grace*, 461 U.S. 171, 183 (1983)).

¹⁰⁸ TEX. HEALTH & SAFETY CODE ANN. § 171.212(a) (West 2021); *see id.* § 171.212(b).

¹⁰⁹ *Id.* § 171.212(b-1).

¹¹⁰ *Id.* § 171.212(e).

¹¹¹ 136 S. Ct. 2292 (2016); *see id.* at 2350 n.34 (Alito, J., dissenting).

¹¹² *Id.* at 2319–20 (majority opinion).

¹¹³ *See* Fallon, *supra* note 99, at 270.

Still, successful facial challenges to SB 8 analogs seem unlikely. First, application-category severance without regard to textual fault lines appears to have been the historical norm.¹¹⁴ Several Justices have expressed openness to returning to this norm,¹¹⁵ including the *Hellerstedt* dissenters.¹¹⁶ A more conservative Court might further embrace this tradition. Enjoining lawsuits also raises First Amendment considerations¹¹⁷ that further counsel in favor of a narrow remedy: to the extent there are *meritorious* applications of a law, the right to court access makes enjoining them particularly discomfiting. Courts are therefore unlikely to facially invalidate an SB 8-like statute. Rather, they might contemplate enjoining some subset of applications — perhaps the application of a certain provision of a statute or the application of the statute to circumstances at least as constitutionally protected as the challenger's.¹¹⁸

(b) *Certification, Relief, and Commonality.* — The question whether a class can be certified if it might include many defendants against whom no relief could issue in the case is, essentially, a question of commonality. Commonality, often analyzed in the same breath as typicality,¹¹⁹ is the requirement that there be “questions of law or fact common to the class.”¹²⁰ A single common question suffices if it is central.¹²¹

The most likely conclusion is that certification must be closely tied to relief. *Brown v. Kelly*¹²² is illustrative. There, the Second Circuit found that a defendant class representative lacked typicality (which the court did not distinguish from commonality) where the common issue — a statute's constitutionality — had previously been decided.¹²³ Because the different government persons that constituted the class had not all continued to enforce the law, the “central issues” were “whether

¹¹⁴ See Walsh, *supra* note 99, at 758–77.

¹¹⁵ See, e.g., *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485–86 (2018) (Thomas, J., concurring); Fallon, *supra* note 99, at 274–76.

¹¹⁶ *Hellerstedt*, 136 S. Ct. at 2352 (Alito, J., dissenting). By the same token, the *Hellerstedt* dissent also suggests that these Justices are not quite prepared to descend to pure by-application severability. *See id.* SB 8 appears to contemplate by-application-category severability. *See TEX. HEALTH & SAFETY CODE ANN. § 171.212(b)* (West 2021).

¹¹⁷ See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

¹¹⁸ Cf. Walsh, *supra* note 99, at 758–59. Since constitutionality is often measured along several axes, the likely result is some kind of “Pareto” constitutionality, whereby an injunction would extend to all circumstances that were at least as constitutionally protected as the challenger's circumstances on all axes. Cf. *Pareto Efficiency*, WIKIPEDIA, https://en.wikipedia.org/wiki/Pareto_efficiency [https://perma.cc/26MC-RK4G].

¹¹⁹ See FED. R. CIV. P. 23(a)(3); 1 RUBENSTEIN, *supra* note 10, § 3:31.

¹²⁰ FED. R. CIV. P. 23(a)(2).

¹²¹ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); 1 RUBENSTEIN, *supra* note 10, §§ 3:20, 3:22.

¹²² 609 F.3d 467 (2d Cir. 2010).

¹²³ *Id.* at 475, 480–82.

enforcement ha[d] persisted and what the scope of injunctive relief, if any, should be.”¹²⁴ Constitutionality itself was insufficiently central.¹²⁵

It is possible that *Brown* was too demanding. It ran afoul of the “one common question” rule, as well as the principle that “commonality is not lost if that issue has been . . . resolved in the plaintiffs’ favor.”¹²⁶ Indeed, comparable cases have found commonality. *Monaco v. Stone*,¹²⁷ for instance, certified a class of state officials where the law challenged had already been adjudicated unconstitutional.¹²⁸

But *Brown* appears to have foreshadowed a narrowing trend in commonality case law. In *Wal-Mart Stores, Inc. v. Dukes*,¹²⁹ the Supreme Court adopted a reformulation of the common *question* requirement as a requirement that a single *answer* “drive the resolution of the litigation.”¹³⁰ Several courts have embraced this reformulation.¹³¹

Additionally, while the standing inquiry in the class certification context focuses on the class representative, some courts have chafed at certifying classes that “sweep[] in some (or many) members” who are not proper parties under Article III, and therefore sought to “ensure that the class is not ‘defined so broadly as to include a great number of members’” against whom relief “for some reason” could not issue.¹³²

If the commonality requirement is flexible, severability need not be addressed at certification, and the class may be certified on the common question of the facial validity of the statute. But on balance, these data points suggest that the class certified must be near-coterminous with the group against whom relief is granted. If so, severability must likely be decided at certification,¹³³ since the court will have to define the class so as to be able to issue class-wide relief. And if the statute is severable, the court will need to cabin the class definition with an asterisk — an asterisk limiting the class to those private attorneys general who attempt to enforce the statute within the severability boundary the court has

¹²⁴ *Id.* at 481.

¹²⁵ *Id.*

¹²⁶ 1 RUBENSTEIN, *supra* note 10, § 3:22 (citing *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 458 (6th Cir. 2020)).

¹²⁷ 187 F.R.D. 50 (E.D.N.Y. 1999).

¹²⁸ *Id.* at 53, 64.

¹²⁹ 564 U.S. 338 (2011).

¹³⁰ *Id.* at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

¹³¹ 1 RUBENSTEIN, *supra* note 10, § 3:19.

¹³² *Id.* § 2.3 (emphasis omitted) (quoting *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012)).

¹³³ At least preliminarily. *See 3 id.* § 7:23.

drawn, who would share the common question whether that subset of applications was unconstitutional.¹³⁴

B. Rule 23(b)

Rule 23(b) provides four avenues for certifying a class. Two, 23(b)(3) and 23(b)(1)(B), are inapplicable to the kind of defendant class action proposed by this Note.¹³⁵ The other two, 23(b)(1)(A) and 23(b)(2), could encompass a defendant class of private attorneys general.

Rule 23(b)(1)(A) authorizes certification where “prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for the party opposing the class.”¹³⁶ It is often used to certify defendant classes of government officials in order to “have a law declared unconstitutional and to enjoin its enforcement throughout an entire state,”¹³⁷ on the theory that varying standards of conduct among enforcers — creating varying standards of conduct between places that should be governed by the same rules — fits within the language of Rule 23(b)(1)(A).¹³⁸ The same logic applies to a class of private attorneys general: two individuals performing the same act could be sued or not based only on whether the individual seeking to sue them had previously been enjoined. Their actions would be protected as to some enforcers but not as to others.

Rule 23(b)(2) provides for certification where “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”¹³⁹ Authorities disagree on whether 23(b)(2) permits defendant classes,¹⁴⁰ but at least as applied to

¹³⁴ Cf. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 951–52 (W.D. Tex. 2011) (certifying a class without ruling on severability, but noting that the creation of subclasses might be appropriate), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012).

¹³⁵ Since 23(b)(3) class members may opt out, FED. R. CIV. P. 23(c)(2)(B)(v), a 23(b)(3) defendant class action would result in serial opt-outs with no one worth binding bound. See 2 RUBENSTEIN, *supra* note 10, § 5:23. Rule 23(b)(1)(B) provides for class adjudication where separate actions would risk “adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests” of nonparties. FED. R. CIV. P. 23(b)(1)(B). To illustrate, the prototypical 23(b)(1)(B) class comprises members seeking judgments against a defendant with limited assets. 2 RUBENSTEIN, *supra* note 10, § 5:21. Rule 23(b)(1)(B) has been extended to defendant classes, but only ones that bear little resemblance to that proposed by this Note. *See id.*

¹³⁶ FED. R. CIV. P. 23(b)(1)(A).

¹³⁷ 2 RUBENSTEIN, *supra* note 10, § 5:20.

¹³⁸ *Id.*

¹³⁹ FED. R. CIV. P. 23(b)(2).

¹⁴⁰ Compare Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980) (per curiam), 7AA MILLER ET AL., *supra* note 27, § 1775, and Ancheta, *supra* note 14, at 311–17, with 2 RUBENSTEIN, *supra* note 10, § 5:22, and Scott Douglas Miller, Note, *Certification of Defendant Classes Under Rule 23(b)(2)*, 84 COLUM. L. REV. 1371, 1371 (1984).

the kind of defendant class proposed here, it is an appropriate vehicle.¹⁴¹ The Rule's language does not distinguish plaintiff from defendant classes: it does not differentiate suing from being sued, the active/passive construction employed by Rule 23(a), or indicate a direction in which relief should flow — in favor of or against the class — instead adopting a bilateral formulation: “*respecting* the class.”¹⁴²

Rule 23(b)(2)'s notes of decision specify that “action directed to a class” includes action that “has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.”¹⁴³ This alleviates two possible concerns. First, the “is threatened” language clarifies that a *potential* act can sustain certification under Rule 23(b)(2). Second, it clarifies that the act need not actually affect all class members; it must only “have general application to the class.” Someone enforcing a right-infringing law based solely on her status as private attorney general is affected by the exercise of the right in a manner identical to that of any other potential private attorney general — which is to say, not at all.

C. Rule 23(a)

On top of commonality, Rule 23(a) includes three requirements that a class must meet to be certified: numerosity, typicality, and adequacy.¹⁴⁴

i. Numerosity. — Rule 23(a)(1) requires that a class be “so numerous that joinder of all members is impracticable.”¹⁴⁵ While dubbed “numerosity,” the core of the provision is the impracticability of joinder.¹⁴⁶ Future class members may be considered, and will cause the numerical part of the requirement to be relaxed,¹⁴⁷ as will the fact that the relief sought is injunctive.¹⁴⁸ Given the class definition, this requirement may be the most challenging, since the suit intends to prevent future class

¹⁴¹ See 2 RUBENSTEIN, *supra* note 10, § 5:22; Brown v. Kelly, 609 F.3d 467, 476–79 (2d Cir. 2010).

¹⁴² FED. R. CIV. P. 23(b)(2) (emphasis added). The singular form of the word “party” is sometimes cited in opposition. See, e.g., *Paxman*, 612 F.2d at 854; Henderson, *supra* note 43, at 1364. But the same singular form arises in the previous subsection. FED. R. CIV. P. 23(b)(1). Read in the context of the Rule, that noun thus seems a thin reed on which to rest that argument. See 2 RUBENSTEIN, *supra* note 10, § 5:22. While the Rule cannot be used solely on the basis of an individual's status as a hypothetical enforcer of the statute under 23(b)(2), cf. Miller, *supra* note 140, at 1393, the proposed class definition has an act as a prerequisite to membership, *see supra* section III.A, pp. 1429–34.

¹⁴³ FED. R. CIV. P. 23(b)(2) advisory committee's note to 1937 adoption.

¹⁴⁴ *Id.* 23(a).

¹⁴⁵ *Id.* 23(a)(1).

¹⁴⁶ 1 RUBENSTEIN, *supra* note 10, § 3:11.

¹⁴⁷ *Id.* § 3:15 (citing *Sueoka v. United States*, 101 F. App'x 649, 653 (9th Cir. 2004) (finding numerosity where the class comprised only “future claimants whose cause of action, if any, ha[d] not yet arisen”)).

¹⁴⁸ See, e.g., *Sueoka*, 101 F. App'x at 653; *J.D. v. Nagin*, 255 F.R.D. 406, 414 (E.D. La. 2009).

members from coming into being. But the numerosity requirement is fundamentally motivated by judicial economy,¹⁴⁹ which is precisely the goal of a defendant class of private attorneys general: obtaining a remedy against as many potential enforcers as possible in one fell swoop.

2. *Typicality Per Se, Younger, and the Class Representative.* — Typicality extends beyond commonality in the requirement that the class representative share the “claims or defenses” of the rest of the class.¹⁵⁰ One typicality issue would be whether the defendant representative had already brought suit under the relevant law. Since bringing suit constitutes enforcement, this question is essentially whether the defendant representative is sued pre- or postenforcement.

Typicality favors selecting a defendant representative who has already brought suit. That representative would not face imminence arguments that might be faced by a representative who had not brought suit.¹⁵¹ But this posture implicates *Younger* abstention. In *Younger v. Harris*,¹⁵² the Supreme Court recognized that federal courts may sometimes abstain from enjoining pending state criminal prosecutions.¹⁵³ *Younger* has been extended to certain state-initiated civil proceedings to enforce state law.¹⁵⁴ If private attorneys general are indeed state actors, the suits they bring could fall into this category, opening the door to *Younger* — a hurdle postenforcement challenges would have to overcome.¹⁵⁵ In *Doe v. Miller*,¹⁵⁶ a defendant class action seeking an antisuit injunction, the court actually excluded parties to pending state proceedings from the class on *Younger* grounds.¹⁵⁷

¹⁴⁹ 1 RUBENSTEIN, *supra* note 10, § 3:11.

¹⁵⁰ FED. R. CIV. P. 23(a)(3). To threaten certification, unique defenses must be significant, plausible, and “likely to be a ‘major focus’ of the litigation.” 1 RUBENSTEIN, *supra* note 10, § 3:45.

¹⁵¹ Most defendant classes of government officials similarly face postenforcement challenges. See, e.g., *Sherman v. Twp. High Sch. Dist.* 214, 540 F. Supp. 2d 985, 990 (N.D. Ill. 2008); *Pa. Ass’n for Retarded Child. v. Pennsylvania*, 343 F. Supp. 279, 281–82 (E.D. Pa. 1972); *Rakes v. Coleman*, 318 F. Supp. 181, 185 (E.D. Va. 1970). That being said, defendant class actions *seeking antisuit injunctions* are generally in a *preenforcement* posture. See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 955 (W.D. Tex. 2011), *vacated in part on other grounds*, 667 F.3d 570 (5th Cir. 2012); *Doe v. Miller*, 216 F.R.D. 462, 463 (S.D. Iowa 2003).

¹⁵² 401 U.S. 37 (1971).

¹⁵³ *Id.* at 41.

¹⁵⁴ *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72–73 (2013). It has also been applied to civil orders “uniquely in furtherance of the state courts’ ability to perform their judicial functions,” *id.* at 73 (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI)*, 491 U.S. 350, 368 (1989)), but that characterization seems inapt in this context.

¹⁵⁵ A postenforcement challenge would also have to overcome the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits federal courts from staying state court proceedings unless an exception — such as an express congressional authorization — applies. However, 42 U.S.C. § 1983 has been held to comprise such express authorization. *Mitchum v. Foster*, 407 U.S. 225, 243 (1972).

¹⁵⁶ 216 F.R.D. 462 (S.D. Iowa 2003).

¹⁵⁷ *Id.* at 465.

But *Younger* is surmountable. First, cases stress the importance of “an adequate opportunity in the state proceedings to raise constitutional challenges.”¹⁵⁸ If the injury alleged is the chilling effect of looming proceedings, the possibility of raising challenges therein may not suffice.¹⁵⁹ Second, some courts have found *Younger* “inapplicable in class actions against certain systemic, widespread constitutional violations.”¹⁶⁰ Third, there is an exception for bad-faith prosecutions.¹⁶¹ This exception is rarely applied, but enforcement of a law openly defying existing precedent, structured specifically so as to chill the exercise of constitutional rights, might fit the bill.¹⁶² *Younger* abstention is a discretionary,¹⁶³ “exceptional”¹⁶⁴ remedy. These circumstances, alongside private attorney general suits’ existence at the margin of private and public enforcement, create a compelling case for not exercising that discretion.

3. *Adequacy*. — Adequacy, the requirement that “the representative parties will fairly and adequately protect the interests of the class,”¹⁶⁵ is unusual in the defendant class context: the putative representative may be the party resisting certification, and accordingly, downplaying her own resources and capacities.¹⁶⁶ Such protestations, however, are often unavailing. Assuming the other Rule 23 requirements are met, courts usually do not balk at forcing an unwilling defendant to represent others similarly situated; commonality, typicality, and financial capacity to defend the claim will usually sum to adequacy.¹⁶⁷ Given the high stakes of the lawsuits proposed, defense counsel seems likely to be forthcoming. The adequacy requirement will therefore likely be met.

D. The Plaintiff Class

This Note draws on an analogy to defendant classes of government officials. Those cases are typically bilateral class actions: a class of

¹⁵⁸ Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 423, 432 (1982).

¹⁵⁹ Cf. *Dombrowski v. Pfister*, 380 U.S. 479, 490–91 (1965) (refusing to abstain, albeit before *Younger*, where the plaintiffs alleged that enforcement was “without any hope of ultimate success, but only to discourage [the plaintiffs’] civil rights activities”).

¹⁶⁰ Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2303 (2018) (citing *M.D. v. Perry*, 799 F. Supp. 2d 712 (S.D. Tex. 2011), vacated on other grounds, 675 F.3d 832 (5th Cir. 2012)).

¹⁶¹ *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

¹⁶² Wasserman, *supra* note 17, at 21–22. A related exception exists for “patently” unconstitutional laws: laws that are unconstitutional “in every clause, sentence and paragraph, and in whatever manner and against whomever” applied. *Younger v. Harris*, 401 U.S. 37, 53–54 (1971) (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). The Court has never applied this exception, and has consistently held facial unconstitutionality alone not to suffice. Smith, *supra* note 160, at 2302–03.

¹⁶³ See *NOPSI*, 491 U.S. 350, 359 (1989).

¹⁶⁴ *Sprint*, 571 U.S. at 78 (quoting *Younger*, 401 U.S. at 56 (Stewart, J., concurring)).

¹⁶⁵ FED. R. CIV. P. 23(a)(4).

¹⁶⁶ See 2 RUBENSTEIN, *supra* note 10, §§ 5:1, 5:12–5:13.

¹⁶⁷ *Id.*

plaintiffs against a class of defendants. It's not clear that Article III strictly requires a plaintiff class. For instance, most antisuit injunction suits are brought on an individual basis, but still obtain injunctions prohibiting the enforcer from enforcing a law against *anyone*, not just the plaintiff.¹⁶⁸ Nonetheless, certifying a plaintiff class is the path of least resistance. The juridical link doctrine was forged in the fires of bilateral classes; it seems unnecessary to attempt to extend it to single-plaintiff cases when courts frequently find classes of civil-rightsholders to meet Rule 23's requirements.¹⁶⁹

IV. THE DUE PROCESS PROBLEM

A. Personal Jurisdiction over Absent Defendants

Typically, to bind a party, a court must have personal jurisdiction over her.¹⁷⁰ This issue usually arises as to defendants, because someone who brings suit is deemed to have consented to the court's jurisdiction.¹⁷¹ It does arise as to plaintiffs, however, in class actions because absent class members have not chosen to be before the court.¹⁷² The Supreme Court in *Phillips Petroleum Co. v. Shutts*¹⁷³ held that a court did not need traditional personal jurisdiction over absent plaintiff class members.¹⁷⁴ It did not, however, decide "how the Due Process Clause applies to defendant class actions."¹⁷⁵ Contrasting defendant- and plaintiff-class members, the Court observed that the substantial "burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant."¹⁷⁶ Where a plaintiff may simply "sit back and allow the litigation to run its course,"¹⁷⁷ a defendant is "faced with the full powers of the forum State to render judgment *against* it."¹⁷⁸

Some read this language as drawing a line along the plaintiff-defendant axis, such that due process "require[s] more in a defendant

¹⁶⁸ See Sohoni, *supra* note 85, at 924–27, 931.

¹⁶⁹ E.g., *Sherman v. Twp. High Sch. Dist.* 214, 540 F. Supp. 2d 985, 994 (N.D. Ill. 2008); Nat'l Org. for Women, Inc. v. Scheidler, 172 F.R.D. 351, 363 (N.D. Ill. 1997). The plaintiff class should, however, mirror the scope of the defendant class. *See Marcera v. Chinlund*, 595 F.2d 1231, 1237–38 (2d Cir. 1979), *vacated sub nom.* *Lombard v. Marcera*, 442 U.S. 915 (1979).

¹⁷⁰ *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940).

¹⁷¹ 2 RUBENSTEIN, *supra* note 10, § 6:25.

¹⁷² *Id.*

¹⁷³ 472 U.S. 797 (1985).

¹⁷⁴ *Id.* at 810–12.

¹⁷⁵ 2 RUBENSTEIN, *supra* note 10, § 6:27. Because defendant employees of a given state are all subject to personal jurisdiction there, cases involving defendant classes thereof do not really answer the personal jurisdiction question.

¹⁷⁶ *Shutts*, 472 U.S. at 808.

¹⁷⁷ *Id.* at 810.

¹⁷⁸ *Id.* at 808.

class action than in a plaintiff class action.”¹⁷⁹ Yet *Shutts*’s language seems to look more to the burden on a party than her role. It compares the onerous requirements of travel and hiring a lawyer to a generic class member’s ability to “sit back” and do nothing, finding due process satisfied by the latter.¹⁸⁰ It discusses the parties’ roles only insofar as that informs how much litigation will cost that party; whether she will be haled into court and forced to litigate there.¹⁸¹ To the extent it draws a plaintiff-defendant distinction, that distinction is purely instrumental. Read in that light, to answer the question whether due process permits binding absent class members — plaintiff or defendant — *Shutts* looks to the burden of litigation. That burden inquiry comports with the convenience inquiry embedded within the “fair play and substantial justice” prong of personal jurisdiction jurisprudence.¹⁸² And the burden is no greater for an absent plaintiff than an absent defendant.¹⁸³

B. The Due Process Balancing Act

There is a give-and-take in the class context between personal jurisdiction and “the other due process requirements — notice, participation [and] opt out rights.”¹⁸⁴ This implies that, to bind an absent defendant, there must be other procedural protections, potentially including opt-out rights, even if not expressly required.¹⁸⁵ An opt-out right would be fatal: anyone potentially interested in acting as private attorney general would exercise it, leaving no one worth binding bound.¹⁸⁶ But this balance can be achieved without opt-out rights.

First, opt-out rights are less critical in a defendant class action than in a plaintiff one. A defendant is to a defendant class as a plaintiff is to a plaintiff class. A potential plaintiff can choose whether to sue. A member of a plaintiff *class* should have the same choice. But a defendant, once sued, cannot simply refuse to be sued. Likewise, nor can a member of a defendant class. So even if an opportunity to opt out of *class representation* may be appropriate, an opportunity to opt out of *being sued at all* is not required. Moreover, many class actions find due process met even without an opportunity to opt out.¹⁸⁷

¹⁷⁹ 2 RUBENSTEIN, *supra* note 10, § 6:27.

¹⁸⁰ See *Shutts*, 472 U.S. at 810–12.

¹⁸¹ See *id.* at 808, 810–11.

¹⁸² Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

¹⁸³ See Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 719 (2005). It is no response to say that if a defendant opts out of class representation, the burdens may be triggered, since the same is true of plaintiff class members.

¹⁸⁴ 2 RUBENSTEIN, *supra* note 10, § 6:27.

¹⁸⁵ See FED. R. CIV. P. 23(c)(2)(A).

¹⁸⁶ See 2 RUBENSTEIN, *supra* note 10, § 5:23.

¹⁸⁷ See *id.* §§ 4:4, 4:36.

Second, a court has other tools to guarantee due process. The hallmarks of due process are notice and the opportunity to be heard.¹⁸⁸ Both are attainable. Classes certified under Rule 23(b)(1) or (2) do not require individualized notice;¹⁸⁹ publication or online notice suffice where each individual class member cannot be precisely ascertained.¹⁹⁰ As for the opportunity to be heard: As suggested above, even if an individual defendant cannot opt out of being sued, she may wish to opt out of class representation if, for instance, she thinks the class's current lawyers are inadequate.¹⁹¹ Rule 23 provides for such intervention.¹⁹²

Finally, additional facts, beyond mere inertia, redress the scales as to personal jurisdiction. Consent and purposeful availment are key indicators of personal jurisdiction.¹⁹³ Anyone choosing (or intending) to enforce an SB 8-like statute by definition would have "purposefully availed" herself of the state's protections (or would intend to).¹⁹⁴ To the extent SB 8 enforcers were acting as the state, personal jurisdiction concerns might well be mitigated.¹⁹⁵ Moreover, the existence of a juridical link may be adequate to impute consent to collective representation.¹⁹⁶

CONCLUSION

SB 8 was specifically designed to circumvent the traditional mechanism of judicial review¹⁹⁷ and chill the exercise of federal rights. By diffusing enforcement across many unrelated individuals, private attorney general mechanisms threaten the way constitutional rights are protected. This Note proposes a mechanism to meet that diffusion, reconcentrate lawsuits, and thereby counteract the chilling effects sought. While this application would stretch the limits of the defendant class, it would not surpass them. In the absence of other mechanisms to respond to private attorney general laws, courts can, and should, embrace it.

¹⁸⁸ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

¹⁸⁹ Or indeed, as a matter of only Rule 23, any notice at all. 3 RUBENSTEIN, *supra* note 10, §§ 8:3–8:4.

¹⁹⁰ *Id.* §§ 8:29–8:30.

¹⁹¹ *Id.* § 9:30.

¹⁹² *Id.*; see also *id.* § 9:37 (noting that members of mandatory classes may also be able to enter appearances without actively intervening).

¹⁹³ See *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024–25 (2021); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985).

¹⁹⁴ See, e.g., *Ford Motor*, 141 S. Ct. at 1024–25.

¹⁹⁵ See *United States v. Texas*, No. 21-CV-706, 2021 WL 4593319, at *35 (W.D. Tex. Oct. 6, 2021) (noting that, in *Arizona v. United States*, 567 U.S. 387, 416 (2012), the Court bound law enforcement officers without first giving them notice or an opportunity to be heard), stay granted, No. 21-50949, 2021 WL 4786458 (5th Cir.), cert. granted, 142 S. Ct. 14, and cert. dismissed, 142 S. Ct. 522 (2021) (mem.) (per curiam).

¹⁹⁶ Miller, *supra* note 140, at 1399; see *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70, 77 (S.D.N.Y. 1986) (noting that the requirements for juridical links speak partly to due process).

¹⁹⁷ See Sullum, *supra* note 61.